ment, the "later date" is the date of the issue of the certificate. If an order is pronounced on a certain date after a hearing in open Court there is no necessity to apply for further argument in open Court and the "later date" should be the date when the order is pronounced after the hearing in open Court, and the present case is such a case. Although under rule 56(a) such order is termed as an order in Chambers, for the purpose of section 68(2) it is not an order made in Chambers.

In the present case since the order was pronounced on September 23, 1985 the notice of appeal should have been filed not later than October 24, 1985. Since it was filed on October 28, 1985 it was out of time. But since the delay was of four days only and there is some difficulty in interpreting rule 56(a) I would allow the appellants to file a fresh notice of appeal within ten days from this order. In view of this, ground (iii) of the respondent's motion is not important or applicable any more. I agree that the motion be dismissed with no order as to costs.

There is also a motion for the dismissal of Civil Appeal No. 366 of 1985 on similar grounds. The facts relating to Civil Appeal No. 366 of 1985 are similar to the facts in this case. I agree that similar orders be made in respect of that appeal.

Order accordingly.

Solicitors: *H.L. Sharma; Yep, Yeo & Nasrim*

DOL BIN LASIM v. PUBLIC PROSECUTOR

MOHAMED SHARIF BIN MATAN v. PUBLIC PROSECUTOR

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C. JJ.) February 6 & June 28, 1986]

[Kuala Lumpur – Supreme Court Criminal Applications Nos. 24 & 25 of 1985]

Criminal Law and Procedure – Acquittal in Sessions Court – Appeal to High Court – Whether High Court can call for a demonstration by chemist – Chemist not affirmed or on oath – Additional evidence when admissible – Additional evidence must comply with provisions of the Criminal Procedure Code – Criminal Procedure Code (F.M.S. Cap. 6), s. 317(i).

Evidence – Additional evidence – Admissibility – Compliance with provisions of the Criminal Procedure Code.

In this case the applicants had been charged with offences under the Prevention of Corruption Act, 1961. The learned President of the Sessions Court acquitted and discharged the applicants at the end of the prosecution case on the 1st charge. He called them for their defence on the 2nd charge and eventually after hearing the defence acquitted them. On appeal the learned Judge of the High Court called the chemist to demonstrate the effect of anthracene powder on documents. He subsequently allowed the appeal and found the applicants guilty on the 2nd charge.

The applicants applied for leave to refer several questions to the Supreme Court and the Supreme Court allowed one question as follows:

"In the appeal against acquittal from the decision of the Subordinate Court to the High Court can the High Court call for a demonstration by a chemist and if so whether the High Court can disregard the result and/or effect of the demonstration in its judgment."

Held: (1) the learned Judge in this case had considered the result and effect of the demonstration but there was no evidence that the chemist in this case was sworn or affirmed nor was there evidence to show whether the parties were given the opportunity to examine the chemist;

(2) an appellate court should be slow to substitute its own view of the facts for that of the trial Judge and therefore in this case the order of the learned President should be restored.

Cases referred to:

(1) *Ramli bin Kechik* v. *Public Prosecutor* [1986] 2 M.L.J. 33.
(2) *Mohamed bin Jamal* v. *Public Prosecutor* [1964] M.L.J. 254.
(3) *R.* v. *Parks* [1961] 3 All E.R. 633, 634; [1961] 1 W.L.R. 1484.
(4) *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.
(5) *Lim Kheak Teong* v. *Public Prosecutor* [1985] 1 M.L.J. 38.
(6) *Mat* v. *Public Prosecutor* [1963] M.L.J. 263.
(7) *Nadarasa* v. *Public Prosecutor* [1972] 2 M.L.J. 47.
(8) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49, 51.

SUPREME COURT.

Christopher Fernando for the applicant in Application No. 24 of 1985.

V. Balasingam for the applicant in Application No. 25 of 1985.

Gooi Soon Seng, (Dy. Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): The applicants applied for leave to refer several questions under section 66(1) of the Courts of Judicature Act, 1964. After hear-

ing the parties we granted leave on one question of law which we considered to be of public interest which had arisen in the course of the appeal in the High Court. The question reads:

"In the appeal against acquittal from the decision of the Subordinate Court to the High Court can the High Court call for a demonstration by a chemist and if so whether the High Court can disregard the result and or effect of the demonstration in its judgment."

It is necessary to set out briefly the facts. On November 22, 1979 in the Sessions Court, Kelang, two charges were preferred against the two applicants for offences under section 4(a) and punishable under section 4 of the Prevention of Corruption Act, 1961. Under each charge they were alleged to have accepted $100/- from Mak Chen as an inducement for doing an act, that is, by giving a favourable report in respect of a traffic accident. At the close of the prosecution case the 2nd charge was amended by the substitution of the words "sketch plan and map" for the words "favourable report". Both applicants were acquitted and discharged on the 1st charge. But they were called to enter their defence on the 2nd charge. The learned President made clear that he did so because of the presumption under section 14 of the said Act. Eventually, he acquitted and discharged them on the 2nd charge. In his judgment he did not make clear whether the presumption had been rebutted or not. The prosecution appealed against the acquittal.

Before the learned Judge the prosecution managed to convince him that the learned President was wrong in acquitting the two applicants for two reasons. First, the learned President held that P.W.1 never asked for the sketch plan and map which was corroborated by P.W.3. Secondly, the learned President had not made any finding whether the defence had rebutted the presumption. These were the two matters which had created the doubt in his mind. If he had not concluded wrongly on the two matters there would be no doubt in his mind. In such a situation the learned Judge could either revert the case back to the learned President to make his finding and touch on the explanation of the two applicants or to order a retrial. Unfortunately, the learned President had left the service. Also, this case was heard *de novo* on three occasions and had been going round the courts for more than ten years. This is a sad reflection on the administration of justice and should not be allowed to be repeated. The learned Judge, in trying to salvage the wreckage, decided to review the evidence and come to a conclusion. But, before doing so he asked the prosecution to arrange for the chemist to give a demonstration on the use of anthracene powder. At page 296 of the Appeal Record the learned Judge made the following notes:

"(Chemist demonstrates to the court the effect of anthracene powder on documents and its effectiveness in contaminating material or the human body which comes into contact with it. Demonstration reveals that the powder does not stick on a smooth surface, like the cover of a book; it can be wiped off.)"

This demonstration has clearly influenced his approach to the case. The applicants said the learned Judge did not touch on this in his judgment. There is no necessity for him to do so as he had expressed himself on this. For on the same page of the Appeal Record he stated that:

"After having seen the demonstration, I feel that I must now view the case somewhat differently. I thought I could give my decision today but now, there has to be some rethinking . . . . . ".

Consequently, he found both applicants guilty on the 2nd charge. In view of the exceptional circumstances of the case he sentenced each applicant to a day's imprisonment and a fine of $1,000 in default a month's imprisonment.

The applicants conceded that the learned Judge had power to call for fresh evidence. He could do this under section 425 of the Criminal Procedure Code which had been dealt with in *Ramli bin Kechik* v. *Public Prosecutor*.[1] In that case the court had to deal with the question whether the trial Judge had erred in law in entertaining the application under section 425 of the Criminal Procedure Code of the Deputy Public Prosecutor during the course of the prosecution case to send nine exhibits found in the possession of the appellant to the Chemistry Department for further examination and the calling of fresh evidence on the said exhibits. The court held the learned Judge had acted judiciously in allowing the exhibits to be sent for further examination by the Chemistry Department. It further held that the learned Judge had a discretion to admit evidence to determine once and for all the true nature of the opium found in the possession of the appellants.

On the other hand, the prosecution contended that in this case the proper provision was section 317 of the Criminal Procedure Code. It is only in the most exceptional circumstances and subject to exceptional circumstances that the appellate court is ever willing to listen to additional evidence. In

Mohamed bin Jamal v. *Public Prosecutor*[2] the Federal Court referred to *R.* v. *Parks*[3] where Lord Parker C.J. stated that the exceptional conditions were (i) the evidence that is sought to call must be evidence which was not available at the trial; (ii) it must be evidence relevant to the issues; (iii) it must be evidence which is credible evidence in the sense that it is well capable of belief; (iv) the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

The prosecution submitted that the learned Judge should not call for a demonstration and conceded that the procedure adopted was not proper. At the time the parties were not concerned about procedure. The additional evidence of the chemist must comply with the provisions of the Criminal Procedure Code. There is nothing to show that the chemist had been affirmed or on oath when he gave the demonstration. There is also nothing to show whether the parties were given the opportunity to examine the chemist. However, it is the submission of the prosecution that independent of the demonstration the learned Judge has come to the right decision. There has been no miscarriage of justice. The applicants stated that the learned Judge should not call for additional evidence if he wanted to convict on other evidence. *Yue Sang Cheong Sdn Bhd* v. *Public Prosecutor*[3] and *Lim Kheak Teong* v. *Public Prosecutor*[4] were cited in support. They urged the court to restore the order of the Sessions Court.

It is not really very important under which provision of the Criminal Procedure Code the learned Judge purported to exercise his power to call additional evidence. But, it should be pointed out that section 317 comes under Chapter XXX dealing with appeals to the High Court. Further, section 317(i) opens with the words "In dealing with any appeal under this Chapter" then it goes on to state that "a Judge, if he thinks additional evidence to be necessary, may either take such evidence himself or direct it to be taken by a Magistrate." We are inclined to agree with the prosecution that section 317 is the provision properly applicable.

Going back to the question under reference we are of the view in this particular case that the answer to the first part is in the negative and there is no necessity to give an answer to the second part of the question. Additional evidence to be taken must be necessary and in proper form.

It is the paramount duty of the court to see that, in the last resort, justice is done and any miscarriage of justice rectified. In view of the fact that the learned Judge came to his conclusion as a result of the demonstration given by the chemist we cannot say he was not influenced by this additional evidence which was not shown to be necessary and also improperly admitted. A Judge cannot simply called for additional evidence just to satisfy his curiosity or doubt or to supplement a gap in the prosecution. Also, such evidence, if necessary, must be in proper form and taken in accordance with the provisions of the Criminal Procedure Code.

We do not expect a Magistrate or a President to write a thesis. In this case the learned President has given a wrong impression on certain facts. He was aware of the amendment to the 2nd charge. He was clearly satisfied that the prosecution had not proved the guilt of the applicants beyond reasonable doubt. He therefore concluded his judgment at page 230 of the Appeal Record as follows:

> "I therefore found that both Accused person had rebutted the case for the Prosecution. I acquitted and discharged both Accused person on the second charge."

The learned President may not have written a very sound judgment. But in acquitting the applicants it must be assumed that he had accepted their explanation however incredulous it may be. As Hashim Yeop A. Sani S.C.J. pointed out in *Lim Kheok Teong* v. *Public Prosecutor*[5] whether given the facts as stated in the Appeal Record could it be said that there was a misdirection? He referred to what Suffian J., as he then was, said in *Mat* v. *Public Prosecutor*[6] as under:

> "The correct law for magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit."

In the same view, Abdul Hamid J., as he then was, in *Nadarasa* v. *Public Prosecutor*[7] stated:

> "To entitle an accused to an acquittal, it is sufficient if after considering the defence, he has cast a doubt on the prosecution case."

Furthermore, an appellate court should be slow to substitute its own view of the facts for that of the trial Judge. The words of Lord Diplock in *Tan Chow Soo* v. *Ratna Ammal*[8] are loud and clear and read:

". . . . . An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial Judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment."

We would set aside the conviction and sentence and restore the order of acquittal and discharge of the learned President on the 2nd charge in respect of the two applicants.

Order accordingly.

Solicitors: *Gunaratnam & Co.; Joseph & Son.*

GOH AH BA v. MOHAMED ZAIN BIN SUDIN

[S.C. (Salleh Abas L.P., Syed Agil Barakbah & Wan Hamzah S.C.JJ.) May 12 & July 1, 1986]

[Kuala Lumpur — Supreme Court Civil Appeal No. 104 of 1985]

Tort — Negligence — Damages — Compound fracture of right upper tibia/fibula — Shortening of right leg — Indigenous treatment — Failure to mitigate damages — Loss of earnings — Special damages.

Damages — Leg — Tibia/fibula compound fracture — 1.5 c.m. shortening.

In this case the respondent had been injured when a piece of plywood fell from the pick-up driven by the appellant and struck the respondent who was at that time riding a motor cycle, as the two vehicles passed each other along the road from opposite directions. The respondent was injured and hospitalised for about four days in hospital and discharged at his own request. The medical report showed that the respondent suffered from a 1½" laceration over the right upper tibia/fibula region with clinically compound fracture of right upper tibia/fibula. A toilet and suture were done for laceration. The fractures in the lower leg was reduced and immobilised in plaster-of-paris case. Subsequently on November 11, 1982 the respondent was further examined by the Consultant Orthopaedic Surgeon, Penang Medical Centre, who confirmed the injuries and concluded that the patient had sustained an open fracture of the tibia at the junction of its upper one-third and lower two-thirds which had united solidly but in a moderately severe angulation position. The fibula had been broken at two sites in the shaft; the upper fracture was not united but the lower fracture was solidly united. As a result, he had leg shortening of 1.5 c.m. with a slight limp when walking. He also had slight knee stiffness and a weaker lower limb. The 1.5 c.m. limb shortening was permanent. There was a danger of osteoarthritis arising in the knee in later years, The doctor was also of the opinion that if the patient had not discharged himself from the General Hospital to seek indigenous treatment the shortening would probably be less in the region of 0.5 to 1 c.m. and the fracture would have ended up with less deformity.

The learned trial Judge awarded $20,000 to the respondent as general damages *i.e.* $18,000 for pain and suffering and $2,000 for loss of amenities. The trial Judge found that prior to the accident the respondent was earning $536 per month as a padi planter but about one year after the accident his income was around $118. Based on this the learned Judge gave an award of $37,351 for special damages, being loss of income up to the date of trial, and $41,617.05 for general damages for loss of future earnings. The appellant appealed against the award of damages.

Held: (1) the award of $18,000 for pain and suffering made by the trial judge was fair and reasonable and in no way excessive;

(2) the award of $37,351 under special damages for loss of earnings was fair and reasonable and in no way excessive;

(3) the trial Judge took into consideration the respondent's failure to mitigate the damages by leaving the General Hospital on his own accord when he deducted 25% from the respondent's monthly earning of $418 and made the award of $41,617.05 under loss of future earnings on the basis of $320 monthly earnings multiplied by sixteen years purchase. He had not erred in so doing.

SUPREME COURT.

Bala Mahesan for the appellant.

Triptipal Singh for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court) : We dismissed this appeal with costs and confirmed the judgment of the learned trial Judge of the High Court, Alor Setar in favour of the respondent/plaintiff. We now give our reasons for doing so.

In the Court below, the respondent sued the appellant for general and special damages due to injuries sustained by him in a motor accident which took place on January 10, 1980 at about 4.15 p.m. along the Jitra/Alor Setar main road when a piece of plywood 4 feet x 8 feet fell from the pick-up driven by the appellant and struck the respondent who was at the material time riding a motor cycle, as the two vehicles passed each other along the road from opposite directions. The respondent was injured and hospitalised for about four days in General Hospital Alor Setar and discharged on his own request.

The General Hospital medical report dated May 12, 1980 as accepted by the trial Judge showed